

No. 48680-6-II

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON**

**DIVISION II**

FILED  
COURT OF APPEALS  
DIVISION II

2016 OCT 24 AM 9:16

STATE OF WASHINGTON

BY                       
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LINDA TIOKASIN-ORR

Appellant

V.

ESTATE OF PATRICIA SPRUANCE ORR

Respondent.

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ON APPEAL FROM CLARK COUNTY SUPERIOR COURT  
(Hon. Robert Lewis)

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**RESPONDENT'S BRIEF**

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## **I. Introduction**

This appeal presents the court with two issues:

**1. Appeal Clearly Without Merit.** Appellant's appeal fails to challenge any finding of fact, fails to show any error in the conclusions of law, and—with one minor exception—cites only to Appellant's own arguments below, most of which are contained in a brief she filed five months after the trial was over, two months after judgment had been entered, and one month after she filed this appeal. Based on these deficiencies, is this appeal clearly without merit?

**2. Frivolous Appeal.** RAP 18.9(a) provides, in pertinent part, that this court “on motion of a party may order a party...who...files a frivolous appeal...to pay terms or compensatory damages to any other party....” For the reasons summarized above, should the court find this appeal frivolous and order Appellant to pay Respondent's attorney fees?

## **II. Statement of the Case**

The parties tried this case to Judge Robert Lewis, sitting without a jury. After the trial, Judge Lewis entered detailed Findings of Fact and Conclusions of Law.<sup>1</sup> Rather than reiterate all the factual findings, Respondent presents the following summary.

This case involves three people: (1) David Orr, (2) his first wife, Patricia, and (3) his second wife, Linda.<sup>2</sup> As part of their divorce, David was obligated to pay Patricia spousal support.<sup>3</sup> David failed to pay full support, so Patricia obtained a judgment against him for roughly \$60,000.<sup>4</sup> Meanwhile, David married Linda and they purchased a home together in Vancouver (the “Property”).<sup>5</sup> While David still owed Patricia

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<sup>1</sup> For the court’s convenience, the Findings of Fact and Conclusions of Law are attached in the Appendix to this brief.

<sup>2</sup> To avoid confusion, these individuals will be referred to by their first name in this brief.

<sup>3</sup> CP 24

<sup>4</sup> CP 24

<sup>5</sup> CP 24

for spousal support, David quitclaimed all his interest in the Property to his wife Linda, for zero consideration.<sup>6</sup>

After David failed to pay the judgment, Patricia filed a fraudulent transfer action against David and Linda alleging, *inter alia*, that David fraudulently transferred his interest in the Property to Linda.<sup>7</sup> The day after filing suit, Patricia recorded a lis pendens on the Property.<sup>8</sup>

Thereafter, Patricia fell ill, and she passed away.<sup>9</sup> The month before she passed away, Patricia dismissed the fraudulent transfer lawsuit; that same day, she released the lis pendens on the Property.<sup>10</sup>

A few months later, Linda sued Patricia's estate, asserting a single claim for damages for a "wrongful lis pendens" under RCW 4.28.328.<sup>11</sup> The trial court rejected

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<sup>6</sup> CP 24

<sup>7</sup> CP 24-25

<sup>8</sup> CP 25

<sup>9</sup> CP 25

<sup>10</sup> CP 25

<sup>11</sup> CP 2

Linda's claim. Based on these unchallenged Findings of Fact, Judge Lewis concluded that:

- ◆ “Patricia had a substantial basis to claim that the transaction was fraudulent,”<sup>12</sup>
- ◆ “Patricia was a creditor of David's at the time he transferred his interest to Linda, for no consideration,”<sup>13</sup> and
- ◆ “Patricia had a good faith basis for filing the lis pendens against the Property.”<sup>14</sup>

Accordingly, Judge Lewis ruled that Linda had not “proven all the necessary elements to establish a claim under the [wrongful lis pendens] statute,”<sup>15</sup> and he entered a final judgment against Linda's complaint.<sup>16</sup>

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<sup>12</sup> CP 25

<sup>13</sup> CP 25

<sup>14</sup> CP 26

<sup>15</sup> CP 25

<sup>16</sup> The judgment, which was entered on February 5, 2016, is attached to Linda's Notice of Appeal.

### **III. This Appeal Lacks Merit**

This court recently summarized the standard of review from a bench trial in a civil matter.

On an appeal from a bench trial, our review is limited to determining whether substantial evidence supports the trial court's findings of fact and, if so, whether the findings support the trial court's conclusions of law. Substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Unchallenged findings of fact are verities on appeal. We defer to the finder of fact on issues regarding witness credibility and the weight of conflicting evidence. We review *de novo* a trial court's conclusions of law.<sup>17</sup>

Appellant has not challenged a single finding of fact by the trial court. Thus, they all should be treated as verities on this appeal.

Moreover, these findings of fact clearly support the court's conclusions of law. David transferred his interest in the Property to his wife Linda, for zero consideration, while David owed money to Patricia. When Patricia filed her lawsuit, this transfer was still recent enough for it to be voided under the

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<sup>17</sup> *In re Wash Builders Benefit Trust*, 173 Wn. App. 34, 65, 293 P.3d 1206, 1222-23, *review denied*, 177 Wn.2d 1018 (2013) (citations omitted)



fraudulent transfer statute. Therefore, it was not merely substantially justified—but prudent—for Patricia to record a lis pendens on the Property. By doing so, Patricia gave notice that her judgment against David could become a lien on the Property.

Appellant’s brief fails to raise any colorable argument that the trial court erred in its legal conclusion that Patricia was substantially justified in recording the lis pendens. Instead, Appellant assigns error to the trial court’s ruling in favor of the Respondent “without addressing the delay” in having the lis pendens removed. But this argument fails for several reasons.

First, there was no showing that there was anything improper about recording the lis pendens in the first place, so there cannot be any actionable “delay” in failing to remove it.

Second, RCW 4.24.328 does not award damages for alleged “delay” in removing a lis pendens; the initial recording of the lis pendens must have been without “substantial justification” for liability to attach.

Third, Appellant’s argument asks this court to assume that Patricia cancelled the lis pendens due to “learning she had no substantial justification” for recording it.<sup>18</sup> Not only is this assumption not supported by any evidence in the record, it is contrary to the trial court’s unchallenged findings.

Finally, Appellant cites no legal authority in support of her assignment of error. The only legal authority she cites is one passage from a practice guide—which she mis-cites and misquotes—to suggest that Patricia violated some “ethical practice” by maintaining the lis pendens while her fraudulent transfer case was pending. But Patricia did not owe any ethical duties to Linda, and even if she had, she did nothing unethical.

In sum, there is no merit to this appeal, and this court should affirm the trial court’s judgment.

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<sup>18</sup> Brief of Appellant (as amended), page 2

#### **IV. This Appeal is Frivolous**

Under RAP 18.9(a), this court can award compensatory damages to the aggrieved party if an appeal is frivolous. As this court has recently held, “An appeal is frivolous and an award of attorney fees may be appropriate when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant *fails* to address the basis of the lower court’s decision.”<sup>19</sup>

As shown above, this appeal is frivolous for all three of these reasons. Based on the *unchallenged findings of fact*, reasonable minds could not differ on whether the *lis pendens* was substantially justified. Because this conclusion of law inexorably follows from the *unchallenged findings of fact*, there is no possibility of reversal. Finally, rather than address the basis of the lower court’s decision, Appellant raises an entirely new claim for the first time on appeal—that even if there were

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<sup>19</sup> *In re Settlement/Guardianship of A G M*, 154 Wn. App. 58, 223 P.3d 1276 (2010) (citation omitted)

substantial justification for recording the lis pendens, there was some wrongful delay in releasing it.

In addition to the foregoing, there is yet another reason this appeal is frivolous—it is not based on any evidence adduced in the trial court. When Appellant filed her original opening brief, it violated RAP 10.3 by failing to include a single cite to the record. This court rejected that brief and required Appellant to resubmit one that adhered to RAP 10.3, which requires that “[r]eference to the record must be included for each factual statement.”

In response, Appellant filed an amended opening brief. But with one minor exception, the amended brief fails to cite to any testimony, exhibit, stipulated fact, or other evidence adduced at trial or otherwise contained in the record.

The vast majority of Appellant’s citations are to “CP 43.” This citation is erroneous because there is no page 43 of the Clerk’s Papers. A review of Appellant’s amended brief demonstrates that all these citations are to the document starting

at CP 16, which is Appellant's "Response to Defendant's Trial Brief." But there are numerous reasons why citing to this document is improper.

The first problem, of course, is that briefs are not evidence. But there is an even more fundamental problem with citing this brief to support her appeal—Appellant did not file the brief in the trial court until five months after the conclusion of the trial, two months after entry of the Findings of Fact and Conclusions of Law, two months after entry of the judgment, and one month after she filed this appeal. In other words, Appellant did not file this brief until after the case was long over at the trial court level.

Appellant's citations to the Report of Proceedings do not fare much better. The first citation is to *oral argument* presented by Appellant in opposition to Respondent's motion for attorney's fees, after the judgment had been entered. Her next citation is to her counsel's *opening statement* during the trial, which also is not evidence. The only citation to actual

testimony is her third citation to the Report of Proceedings, but that self-serving testimony—that David owed Linda “about \$560,000”—has no bearing on whether Patricia’s lis pendens was wrongful, and it is far from sufficient to warrant reversal.

#### **V. Motion for Attorney’s Fees**

RAP 18.9(a) provides, in pertinent part, that this court “on motion of a party may order a party...who...files a frivolous appeal...to pay terms or compensatory damages to any other party....” As shown in this brief, this appeal is frivolous. It does not challenge any of the findings of fact, it does not show how any of the conclusions of law are erroneous, it does not cite to any meaningful evidence in the record, and it wholly fails to articulate a single reason for reversing the trial court’s judgment. Accordingly, pursuant to RAP 18.9(a) and RAP 18.1, Respondent respectfully requests an award of attorney’s fees incurred in this appeal.

## **VI. Conclusion**

For the foregoing reasons, Respondent respectfully requests that the court grant this motion on the merits, affirm the trial court judgment, and award Respondent its attorney fees on appeal.

Signed: October 19, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steve Turner", written over a horizontal line.

WSB No. 33840

*Attorney for Respondent*

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CC

FILED

FEB 05 2016

9:50 AM  
Scott G. Weber, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF CLARK

LINDA TIOKASIN-ORR,  
Plaintiff,

v.

ESTATE OF PATRICIA SPRUANCE  
ORR,  
Defendant

Case No. 14-2-03034-1

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Civil Rule 52

**I. Procedural History**

This matter came before the court on November 23, 2015 for a bench trial before the Honorable Robert Lewis, to hear the complaint of plaintiff against defendant for alleged damages arising from an allegedly wrongful lis pendens that was filed against plaintiff's property in a prior action. Plaintiff was represented by her counsel of record, Kenneth Mitchell-Phillips, and defendant was represented by its counsel of record, Steven E. Turner. After consideration of the evidence presented by the parties at the trial, and of the briefing and oral arguments presented by counsel, the court hereby enters the following findings of fact and conclusions of law



**II. Findings of Fact**

1. Patricia Spruance Orr ("Patricia") and David Orr ("David") were divorced in 2003.
2. Eight months after divorcing Patricia, David married plaintiff, Linda Tiokasin-Orr ("Linda").
3. In May of 2005, David and Linda bought a house together, which was located at 4616 NE 134<sup>th</sup> Street in Vancouver, Washington (the "Property"). The deed by which they acquired the property lists both David and Linda as the grantees, as husband and wife. The Real Estate Excise Tax Affidavit also lists David and Linda as the buyers of the property.
4. David was legally obligated to pay spousal support to Patricia. David fell behind on these spousal support payments.
5. In March of 2011, David quitclaimed all of his interest in the Property to Linda. They were still married at the time, and the Real Estate Excise Tax Affidavit shows that zero consideration was paid for the transfer.
6. In May of 2012, Patricia commenced legal proceedings against David to recover the overdue support payments.
7. Before Patricia was able to obtain a judgment against David for the overdue payments, David and Linda entered into a Separation Agreement and a stipulated General Judgment of Separation, which was filed in Lincoln County, Oregon, on August 1, 2012.
8. On August 30, 2012, Patricia obtained a partial judgment against David for roughly \$30,000 in unpaid spousal support. On October 31, 2012, this judgment was increased to the principal amount of \$60,353.00.
9. On October 30, 2012, Patricia filed a complaint against David and Linda alleging that they had engaged in fraudulent transfers, including the transfer of David's

1 interest in the Property to Linda in March of 2011. The complaint sought to void  
2 this transfer and sought an injunction barring Linda from transferring the Property  
3 to anyone else.

4 10. The following day, on October 31, 2012, Patricia recorded a lis pendens against  
5 the Property as part of the fraudulent transfer lawsuit.

6 11. On February 27, 2014, Patricia voluntarily dismissed the fraudulent transfer  
7 lawsuit. That same day, she recorded a release of the lis pendens on the Property.

8 12. In March of 2014, Patricia passed away, and a probate action was opened to  
9 administer her estate.

10 13. Linda presented a claim against Patricia's estate for damages allegedly caused by  
11 the lis pendens. That claim was denied. The instant lawsuit followed, asserting a  
12 single cause of action for a "wrongful lis pendens."

### 14 III. Conclusions of Law

15 1. RCW 4.28.328(3) provides: "Unless the claimant establishes a *substantial*  
16 *justification* for filing the lis pendens, a claimant is liable to an aggrieved party  
17 who prevails in defense of the action in which the lis pendens was filed for actual  
18 damages caused by filing the lis pendens, and in the court's discretion, reasonable  
19 attorneys fees and costs incurred in defending the action." (Emphasis added)

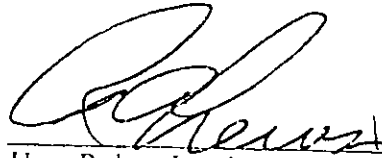
20 2. The Plaintiff has not proven all the necessary elements to establish a claim under  
21 the statute.

22 3. The fraudulent transfer lawsuit alleged that David's transfer of his interest in the  
23 Property to Linda was fraudulent. Patricia had a substantial basis to claim that  
24 this transaction was fraudulent. Patricia was a creditor of David's at the time he  
25 transferred his interest to Linda, for no consideration  
26

1           4.       For the foregoing reasons, Patricia had a good faith basis for filing the lis pendens  
2                   against the Property, and the court will enter a final judgment in favor of the  
3                   defendant and against the plaintiff  
4

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6       Dated: \_\_\_\_\_

2/5/2016



Hon. Robert Lewis  
Judge of the Superior Court

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Respondent's Brief** on:


Linda Tiokasin-Orr  
4616 NE 134<sup>th</sup> Street  
Vancouver, WA 98686

by the following indicated method or methods:

- ☐ **E-mail.**
- ☐ **Facsimile communication device.**
- ☒ **First-class mail, postage prepaid.**
- ☐ **Hand-delivery.**
- ☐ **Overnight courier, delivery prepaid.**

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STATE OF WASHINGTON  
BY                       
DEPUTY

DATED this 19<sup>th</sup> day of October, 2016



Steven E. Turner, WSBA No. 33840  
*Attorney for Respondent*  
*Estate of Patricia Spruance Orr*